


# Appellate Reports

## *Brady v. Bayer Corp.* — Don't call it "One A Day" vitamins and then in small print tell us we must take two; or if you prefer: one gummie a day won't keep the rickets away

**By Jeffrey I. Ehrlich**

**Consumer law; Unfair Competition, Business & Professions Code 17200; False Advertising; CRLA; fine print on consumer labels:** *Brady v. Bayer Corporation* (2018) __ Cal.App.5th __ (Fourth Dist, Div. 3)

Bayer AG, maker and marketer of One A Day brand vitamins, was sued in Orange County Superior Court for alleged violations of California's Consumer Legal Remedies Act, Unfair Competition Law and express warranty law.

Plaintiff Brady's theory is that Bayer's packaging of its "Vitacraves Adult Multivitamin" line of gummies is misleading. He claimed that, despite the One A Day brand name, these particular vitamins require a daily dosage of *two* gummies to get the recommended daily values. Thus buyers end up receiving only half the daily vitamin coverage they think they are getting. The trial court sustained Bayer's demurrer without leave to amend, based on the "Directions" on the back of the vitamin's bottle, which say, in very small print: "Directions: Adults and children 4 years of age and above. Chew two gummies daily." The issue before the appellate court was whether that language is enough to overcome the prominent and arguably advisory brand name of the product. The Court held that it was not.

"One A Day has spent 75 years convincing the public they could be trusted to divine its vitamin needs. Most of the California consumers to whom One A Day sells have spent *literally* their entire lives listening to One A Day tell them, essentially, 'Trust us. We know what you need. You will never know as much about vitamins as we do, but you can rely on us. Take one of our tablets every day and you won't need any other supplements.'"

"Any number of cases have held that brand names *by themselves* can be misleading in the context of the product being marketed. That's not surprising given that, as Amicus Attorney General points out, marketing theory emphasizes the use of *descriptive* brand names as a marketing strategy. The advantage of a descriptive brand name is that it requires of the consumer 'little thought, little explanation, little effort to build understanding of what the offering actually is.' Indeed, the Attorney General notes that in marketing literature there is an awareness that 'Most of the time when people encounter your name, you won't be there to explain it to them. *And they won't have the time or interest to read about it on your website or the back of the box.*'"

"Here's how we break it down: 1. *Common sense*: Bayer's One A Day gummies cannot be said, as a simple application of common sense, to indicate that two gummies a day are required. Indeed, common sense flows in the other direction: If the label prominently displays the words "One A Day" there is an implication that the daily intake should be one per day. 2. *Literal truth*: In the context of its gummie product, the One A Day brand name is literally false. A consumer seeking to get the "one a day" amount of vitamins associated with the brand's capsules will not take *one a day*. 4. *Nature of the brand name:* "One A Day," when it comes to gummies, is explicitly misleading. Even judges can do enough math to know two does not equal one.

But the most damaging of these themes to Bayer's position in our case is 3, *the front-back problem*. The front of the product makes no attempt to warn the consumer that a one-a-day jar of gummies is in fact full of two-a-day products. One must look at the back of the jar, in small print in the upper right-hand corner, to receive the direction to "Chew: two gummies daily," making a "Serving Size" indeed two gummies. And unlike the billboard, sunburst-backed brand name print, that information is printed in nano-type."

**Legal ethics; conflicts of interest; conflict waivers; remedies**; **arbitration:** *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Company, Inc.* (2018) __ Cal.5th __ (Cal.Supreme)

Sheppard Mullin agreed to represent J-M in a federal qui tam action brought on behalf of a number of public entities. During the same time period, the firm represented one of these public entities in matters unrelated to the qui tam suit. Both clients had executed engagement agreements that purported to waive all such conflicts of interest, current or future, but the agreements did not specifically refer to any conflict and the firm did not tell either client about its representation of the other. This arrangement fell apart when the public entity discovered the conflict and successfully moved to have the firm disqualified in the qui tam action. A fight over J-M's outstanding bills to Sheppard Mullin followed, and the

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dispute was sent to arbitration in accordance with an arbitration clause in the parties' engagement agreement.

The arbitrators ruled in the law firm's favor and the superior court confirmed the award, but the Court of Appeal reversed. That court concluded that the matter should never have been arbitrated because, notwithstanding the broad conflict waiver in the engagement agreement, the law firm's undisclosed conflict of interest violated rule 3-310(C)(3) of the Rules of Professional Conduct. This ethical violation, the court ruled, rendered the parties' agreement, including the arbitration clause, unenforceable in its entirety. The Court of Appeal further held that the conflict of interest disentitled the law firm from receiving any compensation for the work it performed for the manufacturer while also representing the utility district in other matters. The Supreme Court granted review and affirmed in part and reversed in part.

The Court agreed with the Court of Appeal that, under the framework established in *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, the law firm's conflict of interest rendered the engagement agreement with J-M, including its arbitration clause, unenforceable as against public policy. Although J-M signed a conflicts waiver, the waiver was not effective because Sheppard Mullin failed to disclose a known conflict with a current client. But the Court concluded, contrary to the Court of Appeal, that the ethical violation does not categorically disentitle the law firm from recovering the value of the services it rendered to the manufacturer; whether principles of equity entitle the law firm to some measure of compensation is a matter for the trial court to address in the first instance.

**Eighth Amendment; elements of excessive-force claim:** *Hoard v. Hartman* (9th Cir 2018) __ F.3d __

Hoard was an inmate at a prison in Oregon, confined to a cell in the Intensive Management Unit ("IMU"). The IMU is a maximum custody unit reserved for inmates who have previously exhibited violent behavior or who otherwise present serious management concerns. Inmates confined in the IMU are subject to significant restrictions. They are not permitted to keep their razors in their cells and must request them from the correctional officer on duty. They spend 23 hours a day in their cells and may leave only for showers, recreational activity, and medical attention. Before exiting their cells, IMU inmates must be handcuffed through a cuff port. At least two correctional officers are required to escort IMU inmates to their destination at all times.

On the morning of December 21, 2012, Hoard requested a razor for personal use. Officer Ortega, the correctional officer on duty that morning, granted Hoard's request and issued him a razor pursuant to IMU policies. The parties dispute whether Officer Ortega provided Hoard with a functioning razor. Regardless, it is undisputed that Hoard smashed the razor into pieces out of frustration, flushing the smaller fragments down the toilet and sweeping the larger ones into the trash can. Unable to retrieve the razor during his return trip to Hoard's cell in the afternoon, Officer Ortega enlisted the assistance of Sergeant Brown and Officer Saldivar to conduct a search of Hoard's cell for the missing razor pieces. The parties agree that Hoard initially complied with the search and submitted to the restraints without difficulty. Hoard was cuffed and left outside his cell, during which time he was "compliant," "quiet," and behaving "fine."

The parties' accounts of what occurred after this diverges. Hoard testified at trial that while waiting for the other officers to complete their search, Officer Hartman approached him and started choking him. Another officer came out and told Hartman to stop, but when that officer went back to searching the cell, Hartman renewed the attack. Hartman allegedly grabbed Hoard by the back of his head and slammed his face against a steel door. Hoard testified that he lost consciousness and that when he came to a short while later, he felt blood dripping down his face and off his nose. He also realized that his pants and underwear had been pulled down to his ankles, leaving him exposed in front of the officers and other inmates. Hoard testified that although the other three officers were present and watching, none of them offered him any help or explanation for what happened. Hoard curled himself into a fetal position on the ground, but to no avail. Declaring that "this" was what Hoard deserved, Hartman allegedly proceeded to slam Hoard's face into the concrete floor, scraping his bleeding cut across the drain.

The officer testified that Hoard grew increasingly agitated while waiting for the search to finish and began to "thrash his head back and forth" as the other inmates taunted him from inside their cells. Officer Hartman testified that he ordered Hoard to remain calm and then "placed" Hoard against the cell door. Officer Saldivar testified that he briefly stepped outside of Hoard's cell to tell Hoard to "relax," but that he returned to the cell after Hartman told him to go back to the search. After overhearing Hoard demand that Hartman let him go, Saldivar moved to assist Hartman with restraining Hoard. Saldivar testified that he grabbed and swept Hoard's legs and that the movement pulled Hoard's pants and underwear down, leaving Hoard exposed. Hoard allegedly then asked the officers, "Is this all you got?"

Hartman testified that together with Saldivar, he "plac[ed]" Hoard on the floor and used only "minimal" force to restrain Hoard. Hartman also testified that he never saw Hoard's pants pulled down to his ankles and that Hoard never lost consciousness.

A few days after the incident, Hoard attempted suicide by overdosing on pills. He testified that his suicide attempt was fueled in part by the embarrassment and

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humiliation he felt at having his pants and underwear ripped down in front of the other inmates, some of whom he "considered predators." As for physical injuries, in addition to the cut on his face – which left a scar on his head – Hoard suffered continuous pain on the right side of his face and in particular, his right jaw, for which he was eventually prescribed painkillers. Hoard was also prescribed a mouth guard for the pain and placed on a liquid diet for a short period of time. At Hoard's request, he was moved from a liquid diet to a soft diet, which lasted under a month. The injury did not fully heal: three years later, Hoard testified that he could not fully open his mouth without popping his jaw and that his jaw would hurt if he talked for too long.

Hoard filed a lawsuit against the officers, which went to trial against Hartman, for use of excessive force, and Saldivar, for deliberate indifference to such use of force. Pursuant to the parties' jointly proposed jury instructions, the district court instructed the jury that to succeed on his excessive force claim, Hoard had to prove that Hartman "used excessive and unnecessary force against the plaintiff under all the circumstances," that Officer Hartman had "acted maliciously and sadistically for the purpose of causing harm," and that Officer Hartman's acts harmed Hoard.

The jury returned a verdict finding that Hoard had failed to prove that Hartman had used excessive force, which necessarily foreclosed the claim against Saldivar. Reversed.

During deliberations, the jury asked the court to "provide a definition for maliciously and for sadistically as it pertains to this case." The court gave the jury a supplemental instruction, approved by Hoard's counsel, that "[t]he term 'maliciously' in the instructions has its ordinary meaning, which is 'having or showing a desire to cause harm to another.' Likewise, the term 'sadistically' has its ordinary meaning, which in this context means 'having or deriving pleasure from extreme cruelty.'"

"There is no doubt that the Constitution does not require proof of sadism, or pleasure from extreme cruelty, for excessive force claims brought under the Eighth Amendment. Accordingly, the district court erred when it included such a requirement in its supplemental instruction to the jury." By instructing the jury that "maliciously and sadistically for the very purpose of causing harm" required "having or deriving pleasure from extreme cruelty," the district court required Hoard to prove that Officer Hartman acted with a subjective state of mind far more demanding than that of intent to harm. This was error.

At no point has the court required plaintiffs to prove that their alleged abusers derived pleasure from acts of extreme cruelty in order to prevail on an excessive force claim. The reason for this is simple: sadism is not – and has never been – an element of excessive force. Just as a district court commits plain error "when its jury instructions fail to incorporate an element of the crime that has been clearly established by Ninth Circuit precedent," so, too, does it commit plain error when it adds an obviously nonexistent element to the plaintiff's burden of proof.

Because the district court's instruction went to the heart of Hoard's excessive force claim and improperly added to his burden of proof, the court concluded that Hoard was prejudiced by the district court's erroneous instructions.


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